Jurisdictional Statement

No. 81-1529

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WALTER BILOFSKY and
RAYMOND L. WEISBERG, M.D.,

Appellants,

vs.

GEORGE DEUKMEJIAN, Attorney General of California; JOHN K. VAN DE KAMP, District Attorney of Los Angeles; THE STATE OF CALIFORNIA,

Appellees.

ON APPEAL FROM
THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION FOUR

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Does California Elections Code section 29770, which prohibits the proponent of an initiative petition from using the names or addresses of the signers of the petition to mail anything to such signers, violate the rights to petition, to speak, and to associate protected by the First and Fourteenth Amendments to the United States Constitution?

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OPINIONS BELOW

The Judgment of the Superior Court (Appendix A) is not reported.

The Opinion of the Court of Appeal, Second Appellate District, Division Four, is reported as Bilofsky v. Deukmejian, 124 Cal. App. 3d 825, 177 Cal. Rptr. 521 (1981) (Appendix B).

The Order Denying Rehearing (Appendix C) and the Order Denying Hearing By California Supreme Court (Appendix D) will be noted in the citations above when the final hard bound volume is published. They do not now appear in the advance sheets cited above.

JURISDICTION

This is an action for injunctive and declaratory relief attacking the constitutionality of California Elections Code section 29770. Appellants contended in the Superior Court and again

in the Court of Appeal that section 29770, as construed by the State of California, violated the First and Fourteenth Amendments to the United States Constitution.

The California Court of Appeal, Second Appellate District, Division Four, in an Opinion filed October 21, 1981, upheld the constitutionality of Elections Code section 29770.

Appellants filed a timely Petition For Rehearing with the California Court of Appeal, which denied it without opinion on November 10, 1981.

Appellants filed a timely Petition for Hearing with the California Supreme Court, which denied it without opinion on December 16, 1981. Appellants were obligated to seek discretionary review in the California Supreme Court prior to filing their Notice of Appeal, and they did so. See Stratton v. Stratton, 239 U.S. 55, 60 L.Ed. 142, 36 S.Ct. 26 (1915).

Having been denied discretionary review by the California Supreme Court on December

16, 1981, appellants thereafter had 90 days in which to file their Notice of Appeal with the California Court of Appeal, Second Appellate District, Division Four. See Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 98 L. Ed. 583, 74 S.Ct. 396 (1954).

Appellants have properly invoked this Court's appellate jurisdiction because appellants are challenging the opinion of the California Court of Appeal, which upheld the constitutionality of the statute in question. See 28 U.S.C. section 1257(2) and Pruneyard Shopping Center v. Robins, 447 U.S. 74, 64 L.Ed.2d 741, 100 S.Ct. 2035 (1980).

This Court has previously reviewed appeals from California courts wherein suits seeking injunctive and declaratory relief on First Amendment grounds were filed to challenge certain state or local laws. See, e.g. Metromedia, Inc. v. San Diego, ___ U.S. ___, 69 L.Ed.2d 800, 101 S.Ct. 2882 (1981) and Citizens Against Rent

Control v. City of Berkeley, ___ U.S. ___, ___ L.Ed.2d ___, 102 S.Ct. 434 (1981). Of course, these two cases came from the California Supreme Court. This Court may also review California Court of Appeal decisions when the California Supreme Court has denied review. See, e.g., Faretta v. California, 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975).

Appellants filed their Notice of Appeal on February 3, 1982 with the California Court of Appeal, Second Appellate District, Division Four.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIRST AMENDMENT:

> "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

FOURTEENTH AMENDMENT:

> ". . . No state shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CALIFORNIA ELECTIONS CODE SECTION 29770:

"No circulator of an initiative, referendum, or recall petition shall permit the list of signatures on the petition to be used for any purpose other than qualification of the initiative or referendum measure or recall question for the ballot. Violation of this section is a misdemeanor."

STATEMENT OF THE CASE

Appellants have been trying, without success, to secure the adoption of a law in California to protect non-smokers from the smoke of smokers in enclosed public places. They have so far twice resorted to the initiative process to accomplish this purpose.

In 1978 they circulated a petition, later known as Proposition 5, which qualified for the statewide ballot. A second effort, the "Smoking

and No-Smoking Sections" petition, reached the statewide ballot in 1980 (Proposition 10), but was again defeated. In both elections the opposition was essentially the tobacco industry, which spent millions of dollars in the campaign.[1/]

During these campaigns, both before and after the petitions were filed and before and after they qualified for the ballot, appellants wanted to use the names and addresses of the signers to mail to them blank petitions with a request that they circulate them and return the signed petitions to appellants for filing, to mail notices to signers of campaign events and information concerning the progress of the campaign, and to mail to them additional materials, including solicitations for funds, for purposes consistent with the objective of the campaign.

1/ The 1980 initiative campaign was mentioned by Mr. Justice White in his dissenting opinion in Citizens Against Rent Control v. City of Berkeley, ___ U.S. ___, ___ L. Ed. 2d ___, 102 S. Ct. 434, 443, n. 3 (1981).

They still wish to place such a measure on the ballot in the future and campaign for its passage. Accordingly, they still want to be able to mail the materials described above. They have no intention of compiling a permanent mailing list or disclosing the names and addresses from the petitions to third parties.

As the Court of Appeal stated, to be effective, a mailing must go to pre-selected recipients, such as persons who have signed a petition. Most of the signers of a petition can be identified as persons sympathetic to the objectives of the campaign. Much or all of the funds needed in the campaign can be generated in small amounts from signers, thus enabling citizen groups to succeed against wealthy special interests. However, the circumstances of obtaining signatures on petitions afford little opportunity for discussion with signers to solicit their participation. Circulators are usually unable to provide information as to future campaign events because they are not yet planned.

It is necessary, therefore, that the circulators have use of the names and addresses on the petitions to enable communication with signers at a later time.

Appellants were and are willing to place a printed warning on their petitions to alert signers in advance that if they sign the petition they may or will receive mail from them. They were and are also willing to provide a box for the signer to check if he or she objects to mail or is willing to have mail sent to him or her.

The Attorney General of California published an official opinion stating that Elections Code section 29770 totally prohibits the proponent or circulator of an initiative, referendum, or recall petition from communicating by mail with signers by obtaining their names and addresses from the petitions. 63 Ops. Cal. Atty. Gen. 37 (1980).

Not wishing to be prosecuted for violating Elections Code section 29770, which is a penal statute, appellants filed this lawsuit on February

11, 1980 in the Superior Court of California for the County of Los Angeles. At the time, they were circulating the "Smoking and No Smoking Sections" petition, which later qualified for the ballot as Proposition 10, but which was defeated on November 4, 1980. Appellants sought an injunction to prohibit enforcement of the statute and a declaratory judgment that either the Attorney General's construction was erroneous or, if properly construed, that it violated the free speech, petition, and freedom of association rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.[2/]

The court trial was conducted on the basis of affidavits submitted by appellants. No contrary evidence was submitted by appellees. Appellants' evidence established that it would be too costly and

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2/ Appellants' challenge was also based on the California Constitution, but in this Court appellants have abandoned such independent state grounds.

administratively impossible for appellants to circulate two separate petitions so that the signers could sign a second document authorizing later contact by mail. The trial court, in ruling in favor of appellees, made no finding on this point. The trial court upheld the constitutionality of section 29770 and declared that appellants could not mail as they desired to do. The trial court adopted the Attorney General's construction of the statute.

Appellants appealed to the California Court of Appeal, Second Appellate District, Division Four, and sought a ruling that the statute was unconstitutional for the same reasons asserted in the trial court. The Court of Appeal rejected appellants arguments and upheld the statute as construed by the Attorney General. In its opinion the Court of Appeal stated, with no support in the record and, indeed, contrary to the record;

> ". . . [T]here is nothing to prevent the circulator, at the time he obtains a signature on the petition from

> obtaining his signature on another document authorizing the proponent later to contact him. . . ." 124 Cal. App. 3d at 834.

Appellants filed a Petition For Rehearing in the Court of Appeal but it was denied without opinion on November 10, 1981. Thereafter, appellants filed a Petition For Hearing with the California Supreme Court. In their Petition appellants reiterated their First and Fourteenth Amendment arguments rejected by the trial court and the Court of Appeal. Specifically, appellants argued the statute, as construed by the Attorney General, the trial court, and the Court of Appeal, violated appellants rights of free speech, petition and association. The California Supreme Court, which has discretionary review authority, declined on December 16, 1981 to review the case.

THE QUESTION IS SUBSTANTIAL

The California Court of Appeal relied heavily upon the California Supreme Court's decision in Citizens Against Rent Control v. City of Berkeley, 27 Cal. 3d 819 (1980), which upheld the constitutionality of a municipal ordinance which limited to $250.00 the amount anyone could contribute to support or oppose an initiative measure on the ballot. In support of its ruling the California Supreme Court stressed the important governmental interest in preserving the integrity of the initiative process.

Unfortunately, the Court of Appeal's decision below was filed on October 21, 1981, about 7 weeks prior to this Court's reversal of the California Supreme Court. On December 14, 1981, this Court reversed the decision of the California Supreme Court in Citizens Against Rent Control v. City of Berkeley, ___ U.S. ___, ___ L.Ed.2d ___, 102 S.Ct. 434 (1981). Thus, the very

foundation of the decision below was destroyed by this Court's opinion. It is likely that the California Supreme Court was not aware on December 16, 1981, when it denied a hearing, what this Court did to its opinion just two days earlier. Thus, at a minimum, this Court should note probable jurisdiction, summarily vacate the judgment below, and direct the Court of Appeal to reconsider its decision in light of this Court's decision in Citizens Against Rent Control v. City of Berkeley, supra.

Of course, appellants suggest the better alternative would be for this Court to note probable jurisdiction and later reverse on the merits.

The question presented by this appeal is substantial. The Court of Appeal did not give enough weight to the First and Fourteenth Amendment interests of appellants.[3/] All these interests -

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3/ Appellants only mention the Fourteenth Amendment because a state statute is involved. Since (cont.)

speech, petition, and association, are involved here, although they overlap and may be lumped together for purpose of analysis. The Chief Justice recently observed in Citizens Against Rent Control v. City of Berkeley, supra, 102 S.Ct. at 439:

> "A limit on contributions in this setting need not be analyzed exclusively in terms of the right of association or the right of expression. The two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression. . . ."

The Court of Appeal virtually guaranteed the wrong result by refusing to recognize the direct impact on First Amendment rights created by section 29770. As construed by state officials and the state courts, section 29770 prohibits the

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3/ (cont.)

the free speech, petition, and associational rights clearly apply to the states, DeJonge v. Oregon, 299 U.S. 353, 81 L.Ed. 278, 57 S.Ct. 255 (1937), appellants will just refer to the First Amendment for convenience.

proponent or circulator of an initiative petition from using information already in his or her possession - i.e., the name and address of the signer - to mail materials related to the petition to such person. This Court has already recognized the First Amendment right to use the mail for the distribution of information. See, e.g., In re R.M.J., ___ U.S. ___, ___ L.Ed.2d ___, ___ S.Ct. ___, 50 U.S.L.W. 4185 (January 25, 1982); Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 65 L.Ed.2d 319, 100 S.Ct. 2326 (1980); United States Postal Service v. Council of Greenburgh Civic Associations, ___ U.S. ___, 69 L.Ed.2d 517, 101 S.Ct. 2676 (1981); Lamont v. Postmaster General, 381 U.S. 301, 14 L.Ed.2d 398, 85 S.Ct. 1493 (1965). Indeed, even if the mail contained a request for funds to support the petition campaign First Amendment protection would be available. See Schaumburg v. Citizens for Better Environment, 444 U.S. 620, 63 L.Ed.2d 73, 100 S.Ct. 826, reh. denied, 445 U.S. 972, 64 L.Ed.2d 250, 100 S.Ct. 1668 (1980);

Buckley v. Valeo, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976); First National Bank v. Belloti, 435 U.S. 765, 55 L.Ed.2d 707, 98 S.Ct. 1407 (1978).

In addition to constituting a direct infringement on freedom of speech (communication by mail), the statute violates the right to petition and the right to associate also protected by the First Amendment:

> "Congress shall make no law abridging . . . the right of the people . . . to petition the Government for a redress of grievances."

An effective petition campaign requires the organizers to be able to communicate with the signers so that the campaign can grow and be successful. Intertwined with this right to petition is the right of political association, another fundamental right protected by the First Amendment. See Citizens Against Rent Control v. City of Berkeley, ___ U.S. ___, ___ L.Ed.2d ___, 102 S.Ct. 434 (1981); Cousins v. Wigoda,

419 U.S. 477, 42 L.Ed.2d 595, 95 S.Ct. 541 (1975); Kusper v. Pontikes, 414 U.S. 51, 38 L.Ed.2d 260, 94 S.Ct. 303 (1973); Brotherhood of R. Trainmen v. Virginia, 377 U.S. 1, 12 L.Ed.2d 89, 84 S.Ct. 1113 (1964); N.A.A.C.P. v. Button, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963).

The Court of Appeal's answer is that the statute can be justified as a protection of the privacy right of the signer of the petition. Unfortunately, the Court of Appeal failed to identify the nature of the right with more particularity. Certainly it cannot be the right to be left alone. If that right were more important than the First Amendment this Court would not have invalidated a local ordinance which forbade distributors of literature from ringing doorbells or sounding door knockers. This Court said in Martin v. City of Struthers, 319 U.S. 141, 87 L.Ed. 1313, 63 S.Ct. 862 (1943):

> "[D]oor to door campaigning is one of the most accepted techniques of seeking popular support . . . ."

Certainly the receipt of mail is not as intrusive as a knock on the door. This is especially so where one has already indicated some support for the measure. Thus, this Court's decision in Rowan v. United States Post Office, 397 U.S. 728, 25 L.Ed.2d 736, 90 S.Ct. 1484 (1974) does not support the state's interest asserted herein. The Court said that persons do have an interest in preventing unwanted mail from being delivered to their homes. But the mail consisted of unsolicited sexual material which the recipient expressly demanded not be sent to him. The Court in Rowan upheld the validity of a federal statute which prohibited the mailing of offensive sexual material to persons who expressly requested that such materials not be sent.

This Court in Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 65 L.Ed.2d 319, 100 S.Ct. 2326 (1980) rejected the identical privacy argument advanced here by the state and by the court below to justify the mailing prohibition.

The Public Service Commission of New York attempted to support its ban on monthly mail inserts on the asserted privacy interests of the recipients. The Court said the customer ". . . may escape exposure to objectional material simply by transferring the bill insert from envelope to wastebasket." Id. at 542.

The Court of Appeal's failure to recognize the impact on First Amendment rights led to its utilization of the wrong test to determine the constitutionality of the statute. Instead of employing the strict scrutiny test of Consolidated Edison v. Public Service Comm'n, supra, 447 U.S. at 540-541, n. 9, the Court of Appeal employed the balancing test of United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). The wrong test led to the wrong result. Had the more exacting standard been applied, the court below would have necessarily concluded that the statute is overbroad. Assuming arguendo the protection of the "privacy" of the

signer is the governmental interest advanced by the statute, it can be accomplished by less drastic means. See, e.g. Grayned v. City of Rockford, 408 U.S. 104, 33 L.Ed.2d 222, 92 S.Ct. 2294 (1972); Bigelow v. Virginia, 421 U.S. 809, 44 L.Ed.2d 600, 95 S.Ct. 2222 (1975); Doran v. Salem Inn, Inc., 422 U.S. 922, 45 L.Ed.2d 648, 95 S.Ct. 2561 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205, 45 L.Ed.2d 125, 95 S.Ct. 2268 (1975).

One way to protect the "privacy" of the signer is simply to warn him not to sign the petition if he or she is concerned about unwanted mail. Another way is to provide for a check off-system. There are other ways and they can be accomplished by a statute less sweeping in scope.

The solution advanced by the Court of Appeal - the circulation of a second petition or document - is not feasible as the uncontroverted evidence

established.[4/] Moreover, even if it were feasible, the suggestion ignores long standing Supreme Court doctrine:

> "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."
> Schneider v. State, 308 U.S. 147, 163, 84 L. Ed. 155, 60 S. Ct. 146 (1939).

Likewise, one should not have the exercise of his liberty to use his petition to mail materials to those who have signed the petition abridged on the plea that one should use a second petition.

Other arguable governmental interests are likewise not advanced by the statute as construed. For example, if the purpose of the statute is to prevent the compilation of a permanent mailing

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4/ The trial court made no finding regarding the feasibility of using a second petition. Appellees introduced no evidence. Appellants' uncontroverted evidence was that a second petition was not feasible. Thus, the Court of Appeal's gratitous statement about a second document may be rejected by this Court. See Fiske v. Kansas, 274 U.S. 380, 385, 71 L. Ed. 1108, 111, 47 S. Ct. 655 (1927).

list which might be used indefinitely or sold to third parties, this statute sweeps too broadly because it prohibits appellants from simply addressing envelopes from the petition itself. No list need be made. No list would survive the filing of the petition with the appropriate governmental agency.

If the purpose of the statute is to protect the anonymity of the signer, the statute sweeps too broadly because the signer of necessity discloses his identity to the circulator when he signs the petition. The circulator will not and need not disclose the fact of signing to anyone else. All the circulator need do is address an envelope or post card directly from the signed petition. Anonymity is thus preserved.

In short, there is no legitimate or compelling state interest which is advanced by the statute. Whatever minimal interest is involved, protecting the signer from unwanted mail, can be accomplished by a statute less sweeping in scope.

The statute really advances no legitimate state interest. As the Court of Appeal noted, section 29770 was adopted in 1974, long after the rights of initiative, referendum, and recall were established in California. This Court is most familiar with the California initiative process. Indeed, this Court had the opportunity to review a California initiative petition measure in Reitman v. Mulkey, 387 U.S. 369, 18 L.Ed.2d 830, 87 S.Ct. 1627 (1967). At this moment the Court is examining another initiative petition measure. See Crawford v. Board of Education, certiorari granted, ___ U.S. ___, 70 L.Ed.2d 206, ___ S.Ct. ___ (October 13, 1981).

It is also interesting to note, as appellants pointed out below, that no similar prohibition applies to the nominating process for candidates for public office in California. Candidates are nominated by petitions signed by registered voters. No law prohibits the mailing of anything or the compilation of lists based on the nominating petition.

Although not required to do so, appellants did point out this divergent treatment in the lower courts to demonstrate a possible improper purpose behind section 29770. That is, those petitions which may be characterized as "hostile" to our representative form of government - initiative, referendum, and recall - are made more difficult by a statute adopted by the representatives of the people. Petitions which candidates - incumbents and challengers alike - may wish to use to help in thier campaigns, i.e. nominating petitions, are not covered by the same prohibitions. So candidates and elected officials may mail all kinds of materials to those who sign their nominating petitions. One would think that if our elected officials were concerned about the "privacy" of those who sign petitions, they would have extended the same protection to such persons. 5/

5/ For a sample of California law regarding the nomination process see Storer v. Brown, 415 U.S. 724, 752, 39 L.Ed. 2d 714, 735, 94 S.Ct. 1274 (1974).

In any event, it is not necessary for appellants to prove an improper purpose. As this Court stated in McGinnis v. Royster, 410 U.S. 263, 276-277, 35 L. Ed. 2d 282, 93 S. Ct. 1055 (1973):

> "The search for legislative purpose is often elusive enough . . . without a requirement that primacy be ascertained. Legislation is frequently multipurposed; the removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute."

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

HECHT, DIAMOND & GREENFIELD

By: ROGER JON DIAMOND

Attorney for Petitioner

Appendix

APPENDIX A

FILED
JUL 30 1980
COUNTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

WALTER BILOFSKY and RAYMOND L. WEISBERG, M.D.,	)	NO. C 312951
Plaintiffs,	)	
v.	)	DECLARATORY JUDGMENT
GEORGE DEUKMEJIAN, Attorney General of California, on behalf of himsel and all prosecutors of the State of California; JOHN K. VAN DE KAMP, District Attorney of Los Angeles, on behalf of himself and all District Attorneys of the State of California; THE STATE OF CALIFORNIA,	)	
Defendants.	)	

The trial in this action having come on regularly for hearing in Department 14 of the above-entitled court before the Honorable Harold J. Ackerman, Judge Presiding, on July 18, 1980, Hecht, Diamond & Greenfield by Roger Jon Diamond

appearing for plaintiffs, George Deukmejian, Attorney General by Christopher C. Foley, Deputy Attorney General, appearing for defendants GEORGE DEUKMEJIAN and THE STATE OF CALIFORNIA, and John H. Larson, County Counsel, by Tighe F. Hudson, Deputy County Counsel, appearing for defendant JOHN K. VAN DE KAMP,

and the Court having considered as evidence the verified Complaint and Exhibits A and B attached thereto, the Declarations of Walter Bilofsky, Roger Jon Diamond, and William A. Butcher, and Exhibits A and B to the Diamond declaration, all of which were filed in support of a previous Motion for Summary Judgment,

and the Court having heard arguments of counsel on July 25, 1980,

and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Elections Code section 29770 is constitutional on its face.

2. Elections Code section 29770 does prohibit the proponent and circulator of an initiative petition from communicating by mail with those who sign the petition by obtaining their names and addresses from the petition, whether or not the communication relates to the subject of the initiative petition; the proponent and circulator of an initiative petition may not communicate by mail with those who sign the petition by obtaining their names and addresses from the petition.

3. The prohibition described above applies to both the qualification period and the election campaign after the measure qualifies for the ballot.

4. The prohibition described above applies at all times.

DATED: JUL 30 1980

/s/ HAROLD J. ACKERMAN
HAROLD J. ACKERMAN, JUDGE

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

WALTER BILOFSKY and RAYMOND L. WEISBERG, M.D., Plaintiffs and Appellants, v. GEORGE DEUKMEJIAN, Attorney General of California, et al., Defendants and Respondents.	)	2d Civ. No. 60462 (Super. Ct. No. C 312951) FILED OCT 21 1981

APPEAL from a judgment of the Superior Court of Los Angeles County. Harold J. Ackerman, Judge. Affirmed.

Hecht, Diamond & Greenfield and Roger Jon Diamond, for Plaintiffs and Appellants.

George Deukmejian, Attorney General, Richard D. Martland, Assistant Attorney General, Henry G. Ullerich and Christopher C. Foley, Deputy

Attorneys General, for Defendants and Respondents George Deukmejian and the State of California.

John H. Larson, County Counsel and Tighe F. Hudson, Deputy County Counsel, for Defendant and Respondent John Van de Kamp.

Plaintiffs Walter Bilofsky and Raymond L. Weisberg, M.D., sued the Attorney General, the District Attorney of Los Angeles County, and the State of California for a declaration that section 29770 of the Elections Code[1/] is unconstitutional. From an adverse judgment they appeal.

In their complaint they allege that Weisberg is a proponent[2/] and Bilofsky a circulator of a

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1. "No circulator of an initiative, referendum, or recall petition shall permit the list of signatures or the petition to be used for any purpose other than qualification of the initiative or referendum measure or recall question for the ballot. Violation of this section is a misdemeanor."

2. Section 29770 literally is restricted to a "circulator." The Attorney General (63 Ops. Cal. Atty. Gen. 37 (1980)) has construed that term to (cont.)

petition to qualify for the November 1980, general election an initiative measure requiring establishment of "Smoking and Non-Smoking Sections" in enclosed public places, places of employment, educational facilities, health facilities and clinics. They were also circulators of petitions to qualify a similar measure, known as Proposition 5, which was defeated in the 1978 general election. They wish to use the names and addresses of signers to mail to them blank petitions with a request that they circulate them and return the signed petitions to plaintiffs for filing, to mail notices to signers of campaign events and information concerning the progress of campaign events and information concerning the progress of the campaign, and to mail to them additional materials, including solicitations for funds, for purposes consistent with the objective

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2. (cont.)

include a proponent. Plaintiffs make no contention on appeal that the statute has any different application to Weisberg than to Bilofsky.

of the campaign. However, the Attorney General has issued an opinion (63 Ops. Cal. Atty. Gen. 37 (1980)) that it is unlawful for them to do so.

The case was tried on the verified complaint, exhibits to it, and declarations. A judgment was given declaring that:

1. Section 29770 is constitutional on its face.

2. It prohibits the proponent and circulator from communicating by mail with signers, by obtaining their names and addresses from the petition, whether or not the communication relates to the subject of the initiative petition.

3. The prohibition applies both to the qualification period and the election campaign after qualification of the measure for the ballot.

4. The prohibition applies at all times.

Plaintiffs contend that section 29770 violates their rights under the First and Fourteenth Amendments to the United States Constitution, and under the California Constitution (art. 1, §§ 2 and 3;

art. 2, § 8), of petitioning the government, of initiative petition, of free speech and free association. Alternatively, they urge that the section should be construed so as not to prohibit their desired use of signatures during the phase of the campaign in which they seek to qualify the measure for the ballot.[3/]

Although no law precludes plaintiffs from communicating with all California residents to induce them to circulate petitions, contribute funds and otherwise participate in campaigns to qualify an initiative for the ballot, as a practical matter

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3. Subsequent to the judgment, the measure appeared on the ballot as Proposition 10 in the November 1980, general election and was defeated. Although no issue is raised by respondents, plaintiffs in their appellate brief address the issue of mootness. The allege in their complaint that they seek to use in future campaigns to qualify similar initiative measures the information gathered in circulating petitions to qualify Proposition 10. Under these circumstances, continued pulbic interest in the issues and the likelihood of their recurrence require consideration of them on their merits. (Diamond v. Bland (1970) 3 Cal. 3d 653, 657; Libertarian Party v. Eu (1980) 28 Cal. 3d 535, 539; Helena Rubenstein Internat. v. Younger (1977) 71 Cal. App. 3d 406, 411.)

it is necessary to pre-select the recipients of communications. Most of the signers of a petition can be identified as persons sympathetic to the objectives of the campaign. Much or all of the funds needed in the campaign can be generated in small amounts from signers, thus enabling citizen groups to succeed against wealthy special interests. However, the circumstances of obtaining signatures on petitions, often in shopping centers or similar public places, afford little opportunity for discussion with signers to solicit their participation. Many shopping centers have regulations prohibiting the solicitation of funds. These circumstances may preclude enlistment of the signers at that time. Also circulators are usually unable to provide information as to future campaign events because they are not yet planned. It is necessary, therefore, that the circulators have use of names and addresses on the petitions to enable communication with signers at a later time. Section 29770 as construed by the Attorney General prohibits them

from doing so. Thus they urge, they are denied their right of communication and association with those persons in sympathy with the objectives of the campaign, and that denial, in turn, impedes their opportunity of petitioning the government and participating in the initiative process.

In examining the constitutional validity of statutes having impact upon First Amendment rights, the courts draw a distinction between those intended to have a direct regulation upon the exercise of those rights and those having as their objective the protection of a lawful interest of the state and whose impact upon First Amendment freedoms is only incidental. This distinction is pointed out in Konigsberg v. State Bar of California (1961) 366 U.S. 36:

> "At the outset we reject the view that freedom of speech and association [citation], as protected by First and Fourteenth Amendments, are 'absolutes,' not only in the undoubted sense that where the

constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. [Citations.] On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental

interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. [Citations.] It is in the latter class of cases that this Court has always placed rules compelling disclosure of prior association as an incident of the informed exercise of a valid governmental function. [Citation.] Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved."

(366 U.S. at pp. 49-51.)

In their briefs on appeal, plaintiffs argue that the objective of section 29770 was to make more difficult the exercise of the initiative process and in oral argument urged that it was the intent of the Legislature to impede the free exercise of

their constitutional freedoms in this area. They provide no legislative or other evidence of such motivation and we find none. To the contrary, we believe section 29770 was enacted for a proper legislative purpose.

In 1972, the California electorate adopted an amendment to the California Constitution adding to its enumeration of inalienable rights possessed by all persons the right of privacy. Section 29770 of the Elections Code[4/] was enacted in 1974 as part of a chapter adding or amending several sections of the Elections Code. (Stats. 1974, ch. 1410.)[5/]

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4. Section 29770 was enacted in 1974 as section 29256, but was renumbered as part of the extensive revision of the Elections Code in 1976. (Stats. 1976, ch. 1192.)

5. Section 315 (now section 319) pertaining to voters' affidavits was amended to add this significant language:

> "Any memorandum, notations, devices, computer data, or other means or material employed by the clerk indicating which petition or petitions have been signed by any registrant shall be destroyed as soon as practicable after the certification of

(cont.)

The apparent purpose of the Legislature was to implement the California constitutional guarantee

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5. (cont.)

> the results of the election for which such memoranda, notations, devices, computer data, or other means or material was used, or if no election is held, as soon as practicable after the clerk's final certification showing the results of the examination of the petition; but in no event shall such memorandum, notations, devices, computer data, or other means or material be retained for more than 30 days.
>
> "Such memoranda, notations, devices, computer data, or other means or material employed by the clerk indicating which petition or petitions have been signed by any registrant shall be available for the use of the clerk and his staff only and then only for the purposes for which they were prepared. Except as previously provided, they shall not be made available to any person or entity, public or private, for any purpose whatsoever."

Sections 3506 (now section 3512) 3755 (now section 3756), and 4056.5 (now section 4054), concerning initiative and referendum petitions at various governmental levels, were added or amended to include a requirement that the officer receiving petitions

> ". . . shall preserve the petition until eight months after the certification of the results of the election for which the

(cont.)

of privacy by insuring the least interference with that right of persons signing initiative, referendum

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5. (cont.)

petition qualified or attempted to qualify for placement on the ballot. Thereafter, he shall destroy the petition as soon as practicable unless it is in evidence in some action or proceeding then pending or unless he has received a written request from the Attorney General, the Secretary of State, a district attorney, a grand jury, or the governing body of a county, city and county, or district, including a school district, that the petition be preserved for use in a pending or ongoing investigation into election irregularities, the subject of which relates to the petition's qualification or disqualification for placement on the ballot."

Language similar to that just quoted also appears in added sections 27003 (now section 27300) and 27510.5 (now sections 27300 and 27301) and amended section 27205 (now sections 27212, 27214, 27215, 27216, 27300, and 27301), dealing with recall petitions, and added section 5204 (now section 5202) concerning "an initiative, referendum or recall petition" Section 29256 (now section 29770) precluded a circulator from making use of the signatures on the petition ". . . for any purpose other than qualification of the . . . measure or recall question for the ballot."

In the same statute, section 6253.5 was added to the Government Code, providing:

> Notwithstanding the provisions of Sections 6252 and 6253, statewide, county, city, and district initiative, referendum,

(cont.)

and recall petitions.

Plaintiffs contend that because there are involved rights under the First Amendment, we must apply the standard of strict scrutiny to section 29770. But section 29770, having as it does at best only an incidental effect upon those rights is properly examined under the balancing test, as stated in United States v. O'Brien (1968) 391 U.S. 367, 377:

> "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression

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5. (cont.)

and recall petitions and all memoranda prepared by the county clerks in the examination of such petitions indicating which registered voters have signed particular petitions shall not be deemed to be public records and shall not be open to inspection except by the public officer or public employees who have the duty of receiving, examining or preserving such petitions or who are responsible for the preparation of such memoranda."

of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

The importance of the right of initiative has recently been affirmed by the Supreme Court in Citizens Against Rent Control v. City of Berkeley (1980) 27 Cal. 3d 819. There, an ordinance of the City of Berkeley imposed a limitation of $250 per contribution in support of, or in opposition to, any ballot measure. Several persons made contributions in opposition to an initiative measure in excess of that amount, and sued to enjoin enforcement of the limitation on the ground, among others, that it infringed upon their First Amendment right of political advocacy.

The Supreme Court reviewed the ordinance in accordance with the standard of strict scrutiny. It noted that the right of initiative is a power reserved by the people. It is "'the duty of the courts to jealously guard this right of the people,'" and

"[t]here can be no doubt that government regulation designed to preserve the integrity of the initiative and referendum promotes a goal of the highest priority." (27 Cal. 3d pp. 824-825.) Although a limitation upon the amount of contribution to a political committee impinged upon the rights of political contribution and freedom of association, such limitation was justified in view of possible corruption of the initiative process through unlimited contributions. Recognizing that counter arguments could be made as to the merit of such limitation, the court nevertheless concluded that such was ". . . a value judgment. On such matters we yield to legislative determination." (27 Cal. 3d at p. 831.)

Citizens Against Rent Control was concerned with a direct restraint upon the content of communication through an ordinance intended to have that effect. But section 29770 has neither of those attributes. It seeks to preserve as much as possible the privacy of persons who sign petitions as part of the elective

process, insuring that for the exercise of that privilege they shall not be subjected to the consequences of the knowledge by others of that fact. In doing so it furthers the interests of the individual in his privacy and also promotes his freedom in exercising his privilege as an elector. On the other hand, the impact of the section upon the First Amendment rights of others is no greater than under many statutes designed to afford to individuals a privilege of privacy, and which thereby curtail access by others to the privileged area.

Plaintiffs maintain that the section leads to an incongruity in that it denies to them, the persons who caused the signatures to be given and as to whom identities are already known, access to individuals who have in effect enlisted in their cause. They point out that most individuals in our present society are on some mailing list and are accustomed to receiving unsolicited mail, which they may discard if they choose. Any right to privacy from communications from plaintiffs

should be deemed waived.

We believe it a mistake to suppose that a person who signs an initiative or other petition may automtically be deemed to have enlisted in the cause of the proponent. Although many persons undoubtedly sign because they strongly believe in the measure, some may sign because they believe it appropriate to qualify the measure for the ballot so that the voters may decide. Still others may sign because of a yielding to the moral pressure of the moment. The Legislature could properly conclude that, whatever his reason, a signer has the right to the privacy of his decision, secure in the knowledge that the fact of his signing will not be used for any purpose beyond the minimum necessary to forward the initiative process.

Another attack upon the section is upon the ground of overbreadth. Plaintiffs maintain that other methods less restrictive upon their First Amendment rights could have been adopted by the Legislature to achieve the same purpose. Thus,

they argue, the statute could have required that the petition contain a warning to signers that they might receive materials in the mail or contain a box for the signer to check if he objects to being placed on a mailing list.

Section 29770 is not restricted to the circumstance of an attempted communication with the signer but precludes use of the signature for any purpose. Although it is obviously broad in scope it is so designed in order to protect the signer from any use of his identity other than that integral to the initiative process. Proponents are not precluded from contacting signers if they do not obtain their identities from the petition. Furthermore, there is nothing to prevent the circulator, at the time he obtains a signature on the petition from obtaining his signature on another document authorizing the proponent later to contact him. The impact of the section upon plaintiffs' First Amendment rights is thus remote at best. Under these circumstances, clearly the claimed overbreadth does not rise to

the level of being ". . . not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." (Broadrick v. Oklahoma (1973) 413 U.S. 601, 615.)

Finally, we find no merit in two additional contentions. One is that, since the proscription of section 29770 is against use of the list of signatures, plaintiffs should be permitted to use the addresses of signers and send literature to unidentified occupants at those locations. However, the proscription of the section is against use of the list of signatures. The signer is obligated to affix on the petition, in addition to his signature, his printed name, his address and the name of his city or unincorporated community as a part of the process of signing. (Elec. Code, § 3516.)

The Legislature obviously intended to prohibit use of any information required of the signer for any purpose other than qualification of the initiative for the ballot.

The second is that section 29770 prohibits use of the list only for purposes other than qualification of the initiative. Plaintiffs would construe the section as permitting them to use the lists for any purpose consistent with the objectives of proponents in qualifying the initiative for the ballot. We believe that the Legislature in employing this language had in mind the more restrictive meaning of complying with the exacting procedural steps required to obtain, circulate, and process the petitions themselves, as to which circulators have specific duties. (See Elec. Code, §§ 3500-3523.)

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

FOSTER, J.*

We concur:

KINGSLEY, ACTING P.J.

WOODS, J.

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* Assigned by the Chairperson of the Judicial Council.

APPENDIX C

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

WALTER BILOFSKY and RAYMOND L. WEISBERG, M.D.,	) 2d Civ.) No. 60462
Plaintiffs and Appellants,	)
v.	) (Super.) Ct. No.) C 312951)
GEORGE DEUKMEJIAN, Attorney General of California, et al.,	) FILED
Defendants and Respondents.	) Nov. 10, 1981

Petition For Rehearing Denied

Foster, J.
Kingsley, Acting P.J.
Woods, J.

APPENDIX D

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 4, Civil No. 60462

IN THE SUPREME COURT OF THE STATE

OF CALIFORNIA

IN BANK

BILOFSKY et al.

v.

DEUKMEJIAN, etc., et al

Supreme Court

FILED

DEC 16 1981

Appellants' petition for hearing DENIED.

/s/ BIRD
Chief Justice

APPENDIX E

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

WALTER BILOFSKY and RAYMOND L. WEISBERG, M.D.,	) 2d Civ.) No. 60462
Plaintiffs and Appellants,	) (L.A.S.C.) No. C312951
v.	)
GEORGE DEUKMEJIAN, Attorney General of California; JOHN K. VAN DE KAMP, District Attorney of Los Angeles; THE STATE OF CALIFORNIA,	) FILED) Feb. 3, 1982
Defendants and Respondents.	)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Plaintiffs and appellants WALTER BILOFSKY and RAYMOND L. WEISBERG, M.D. hereby appeal to the United States Supreme Court from the opinion and judgment of the California Court of Appeal, Second Appellate District, Division

Four, filed October 21, 1981, and officially entered on December 16, 1981 upon the denial of a petition for hearing by the California Supreme Court on December 16, 1981.

This appeal is being taken pursuant to Title 28 United States Code, Section 1257(2).

Plaintiffs and appellants WALTER BILOFSKY and RAYMOND L. WEISBERG, M.D. will be designated as the appellants in the United States Supreme Court and defendants and respondents GEORGE DEUKMEJIAN, Attorney General of California; JOHN K. VAN DE KAMP, District Attorney of Los Angeles; THE STATE OF CALIFORNIA, will be designated as appellees in the United States Supreme Court.

This Notice of Appeal is properly filed with the California Court of Appeal, Second Appellate District, Division Four, and not with the California Supreme Court. Although this Notice of Appeal is properly filed with this Court, the 90 days in which appellants have to file this Notice of Appeal

began to run on December 16, 1981, when the California Supreme Court denied a petition for hearing. See Rules 10, 11, and 12 of the United States Supreme Court, and Stratton v. Stratton, 239 U.S. 55 (1915); Michigan-Wisconsin Pipeline Company v. Calvert, 347 U.S. 157 (1954) and Faretta v. California, 422 U.S. 806 (1975).

Respectfully submitted,

HECHT, DIAMOND & GREENFIELD

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Motion to Dismiss or Affirm

Office - Supreme Court, U.
FILED
MAY 4 1982
ALEXAND
C.

No. 81-1529

IN THE

Supreme Court of the United States

October Term, 1981

WALTER BILOFSKY and RAYMOND L. WEISBERG, M.D.,
Appellants,

v.

GEORGE DEUKMEJIAN, Attorney General of California; JOHN K. VAN DE KAMP, District Attorney of Los Angeles; THE STATE OF CALIFORNIA,
Appellees.

MOTION TO DISMISS APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

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No. 81-1529

IN THE

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October Term, 1981

WALTER BILOFSKY and RAYMOND L. WEISBERG, M.D.,
Appellants,

v.

GEORGE DEUKMEJIAN, Attorney General of California; JOHN K. VAN DE KAMP, District Attorney of Los Angeles; THE STATE OF CALIFORNIA,
Appellees.

MOTION TO DISMISS APPEAL FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION

Appellees George Deukmejian, Attorney General of the State of California, and State of California, pursuant to Rule 16, move that the appeal be dismissed on the ground that it does not present a substantial federal question.

I

THE IMPACT OF THE STATUTE UPON FIRST AMENDMENT RIGHTS IS REMOTE AT BEST

California Elections Code section 29770 does not prohibit or restrict proponents of an initiative measure from communicating with petition signers personally, by telephone, by mail, or by any other means, at any time or at any place. As the court below noted, the impact upon first amendment rights is remote at best.

The only impact on first amendment rights comes about if proponents choose to ignore the opportunity to communicate with petition signers at the time the signature is obtained, and choose not to compile a list of petition signers apart from the petition itself. Only if proponents seek to use the petition as a mailing list, or for some purpose other than qualifying the initiative measure for the ballot, can any impact on first amendment rights be discerned.

II

THE STATUTE SERVES COMPELLING STATE INTEREST

"California's entire history demonstrates the repeated use of referendums to give citizens a voice on questions of public policy." (*James* v. *Valtierra* (1970) 402 U.S. 137, 141.)

California Elections Code section 29770 serves two compelling State interests. The statute directly protects the right of privacy guaranteed by California Constitution Article I, Section 1, and by so doing furthers and strengthens the right of initiative provided by California Constitution Article II, Section 8. By signing a petition, a citizen does no more than signify a willingness that a particular proposition should be placed on the ballot for the approval or disapproval of the electorate. The signature does not imply endorsement of the ballot proposition, and the signer may or may not be willing to be publicly identified as having signed the petition.

A person signing a petition calling for a ballot proposition guaranteeing the civil rights of homosexuals, for example, may or may not wish to be publicly identified as having signed the petition; the same person may sign a second petition calling for ballot proposition restricting the civil rights of homosexuals,

and not wish to be publicly linked to that petition either. Whether the public identification is direct, such as a newspaper advertisement listing the signers of an initiative petition concerning homosexual rights, or indirect, such as mailing lists sought by appellants here, any public identification of initiative petition signers is an invasion of the privacy of the signers. Petition signers who wish to be publicly identified with the ballot proposition, or who wish to be solicited for contributions or other support, are free to take whatever steps necessary to achieve those aims.

The chilling effect on the initiative process of unrestricted use of the petitions should be apparent. A person who is both willing to sign a petition, and willing to appear on a mailing list, will sign initiative petitions. A person willing to sign a petition, but unwilling to appear on the mailing list, will not sign the petition. The initiative process is thereby weakened.

III

THE STATUTE RAISES NO SUBSTANTIAL FIRST AMENDMENT QUESTION

Given the remote impact on First Amendment Rights, and the significant protection afforded the rights of privacy and initiative, it is submitted that California Elections Code section 29770 raises no substantial First Amendment issue. The opinion of the California Supreme Court in *Citizens Against Rent Control* v. *City of Berkeley* (1980) 27 Cal.3d. 819, reversed by this Court at __ U.S. __, ... L.Ed.2d ....., 102 S.Ct. 434 (1981), was cited by the court below not as direct authority for its holding, but only for the proposition that the right of initiative continues to be accorded a place of importance by California courts (*Bilofsky* v. *Deukmejian,* 124

Cal.App.3d 825, 832). Factually, *Citizens Against Rent Control* concerned a municipal ordinance which limited contributions in campaigns involving initiative measures to $250.00. As the court below in the present case pointed out at 124 Cal.App.3d 832, the *Citizens Against Rent Control* ordinance constituted a *direct* restraint upon communication through an ordinance *intended* to have that effect. By contrast, Elections Code section 29770 is but an indirect, remote restraint on communication, which restraint is merely incidental to the purpose of the statute, which is the furtherance of the initiative process through protection of the privacy of initiative petition signers. This Court's reversal of *Citizens Against Rent Control* should have no effect on the present case, because the California Court of Appeal did not rely on *Citizens Against Rent Control* and because the two enactments are dissimilar in purpose, effect, and impact on First Amendment rights.

The remote and incidental effect on First Amendment rights also makes it clear that the Court of Appeal utilized the proper balancing test of *United States* v. *O'Brien* (1968) 391 U.S. 367. Elections Code section 29770 also meets the more exacting standard of *Consolidated Edison* v. *Public Serv. Comm'n* (1979) 447 U.S. 530, under each of the three theories discussed in that case.

First, Elections Code section 29770 is a reasonable time, place, or manner restriction because it applies only to one manner of communication; viz., use of petitions as mailing lists, and does so without regard to the content of the communication. Other means of communication are completely unrestricted by this statute, including communication with petition signers, unless the name or address is obtained directly from the petition.

Secondly, Elections Code section 29770 is a valid regulation based on subject matter in the sense that all communication with petition signers based on the petition as a mailing list is barred. As stated above, the grouping of persons based on the fact that they signed a particular initiative petition has a chilling effect on the exercise of the right of initiative of those persons who do not wish to be identified with the group. The incidental limitation on free speech is justified by the enhancement of the right of initiative.

Thirdly, Elections Code section 29770 is a narrowly tailored means of serving a compelling state interest. The compelling state interest is the initiative process. A broadly drawn statute would prohibit proponents of an initiative petition from soliciting contributions or support from petition signers at the time the signature is obtained, and prohibit the compilation of a list of petition signers willing to lend their name, funds, or support to the initiative campaign. A broadly drawn statute would protect petition signers from proseletyzing of any sort. This statute is narrowly drawn, prohibiting only use of the signatures for purposes other than that for which the signatures were given—qualification of the initiative for the ballot.

IV

CONCLUSION

Use of initiative petition signatures for fund raising, campaigning, advertising, or other activities aside from ballot qualification would discourage from signing all persons who do not wish to participate in those activities. To remedy that chilling effect on the initiative process, the California Legislature has enacted Elections Code section 29770 to ensure that initiative petitions are used for no purpose other than ballot qualification. The statute prohibits the use of petitions as mailing list, thus arguably impacting first amendment rights. The impact is remote, however, and amply justified by the enhancement of the right to initiative. It is respectfully submitted that the appeal should be dismissed for want of a substantial federal question.

DATED: May 3, 1982

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